

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition for Declaratory Ruling)	
That the Location of the Demarcation Point)	WC-03-112
Pursuant to 47 C.F.R. §68.105(d)(2) Preempts)	
The Location of the Demarcation Point)	
Pursuant to § 25-4.0345(1)(B)(2) of the)	
Florida Administrative Code)	

COMMENTS OF THE REAL ACCESS ALLIANCE

Introduction

The Real Access Alliance (the “RAA”)¹ respectfully submits these Comments in response to the Petition for Declaratory Ruling of ClickQuick II, LLC (“ClickQuick”); San Marino at Laguna Lakes, L.L.C. (“San Marino”); and Villa del Sol, L.L.C. (“Villa del Sol”).² The Petitioners have asked that the Commission preempt § 25-4.0345(1)(B)(2) of the Florida Administrative Code (the “Florida Rule”) to the extent that it conflicts with 47 C.F.R.

¹ The members of the Real Access Alliance are: the Building Owners and Managers Association International (“BOMA”), the Institute of Real Estate Management (“IREM”), the International Council of Shopping Centers (“ICSC”), the National Apartment Association (“NAA”), the National Association of Home Builders (“NAHB”), the National Association of Industrial and Office Properties (“NAIOP”), the National Association of Realtors (“NAR”), the National Association of Real Estate Investment Trusts (“NAREIT”), the National Multi-Housing Council (“NMHC”), and The Real Estate Roundtable. A fuller description of the parties is attached hereto as Exhibit A.

² San Marino and Villa del Sol shall be referred to jointly as the “Property Owners”; ClickQuick and the Property Owners shall be referred to jointly as the “Petitioners.”

§ 68.105(d)(2) (the “FCC Rule”). The Petitioners have also asked that the Commission find that the Property Owners are permitted to set the telephone demarcation point on their properties at a place of their choosing, and that ClickQuick has the right to use facilities located on the customer’s side of those demarcation points without interference by BellSouth Communications, Inc.

Based on the plain language of the Florida Rule and the FCC Rule, the RAA believes that the Florida Rule should be preempted, at least insofar as BellSouth has interpreted it as preventing the Property Owners from exercising their right to move the demarcation point to a place of their choosing. In addition, based on the facts alleged by Petitioners, the RAA believes that the Property Owners have the right under the FCC Rule to determine the location of the demarcation point in their respective buildings. Finally, the RAA believes that the Petition raises important questions regarding the rights of competitive providers to deliver services using facilities on the customers’ side of the demarcation point.

I. THE FCC RULE EXPRESSLY PERMITS BUILDING OWNERS TO DETERMINE THE LOCATION OF THE DEMARCATION POINT; THE FLORIDA RULE MUST BE PREEMPTED TO THE EXTENT IT INTERFERES WITH THAT RIGHT.

The FCC Rule states:

In multiunit premises in which wiring is installed, including major additions or rearrangements of wiring existing prior to that date, the provider of wireline telecommunications may place the demarcation point at the minimum point of entry (MPOE). If the provider of wireline telecommunications services does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. The multiunit premises owner shall determine whether there shall be a single demarcation point location for all customers or separate such locations for each customer. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer’s premises than a point 30 cm (12 in) from where the wiring enters the customer’s premises, or as close thereto as practicable. At the time of installation, the provider of wireline telecommunications services shall fully inform the premises owner of its options and

rights regarding the placement of the demarcation point or points and shall not attempt to unduly influence that decision for the purpose of obstructing competitive entry.

47 C.F.R. § 68.105(d)(2).

The Florida Rule states that the “Demarcation Point” is:

The point of physical interconnection (connecting block, terminal strip, jack, protector, optical network interface, or remote isolation device) between the telephone network and the customer’s premises wiring. Unless otherwise ordered by the Commission for good cause shown, the location of this point is . . . within the customer’s premises at a point easily accessed by the customer.

Fla. Admin. Code § 25-4.0345(1)(B)(2).

There is a clear conflict between these two rules. The FCC Rule allows the premises owner to establish the location of the demarcation point, if the provider has not set it at the MPOE. The Florida Rule sets the demarcation point at a point within the customer’s premises. Because the Florida Rule does not acknowledge the right of the premises owner to establish the location of the demarcation point at a place other than a point within the customer’s premises, it conflicts with the FCC Rule and is therefore preempted. *NARUC v. FCC*, 880 F.2d 422 (D.C.Cir. 1989) (FCC may preempt state regulation of inside wiring if state regulation interferes with federal policy of promoting competition).

The purpose of the FCC Rule further illustrates the need for preemption. When the FCC first detariffed inside wiring, it expressly intended to promote competition in the installation and maintenance of such wiring. *Detariffing the Installation and Maintenance of Inside Wiring*, Memorandum Opinion and Order, 1 FCC Rcd 1190 at 1195, ¶ 35 (1986). This is a valid reason for preempting state regulation of inside wiring. *NARUC v. FCC*, 880 F.2d at 431. In addition to promoting competition in the installation and maintenance of inside wiring, the Commission has recognized that allowing an incumbent to exercise control over inside wiring also impedes competition in the delivery of services. The FCC Rule itself states that the incumbent carrier

“shall not attempt to unduly influence [the owner’s] decision for the purpose of obstructing competitive entry.” In other words, one purpose of the FCC Rule is to facilitate entry by competitive providers.

The RAA supports the FCC Rule for two reasons. First, the FCC expressly intended to preserve flexibility in multiunit installations, which is important because circumstances vary from one building to another. And second, because the RAA supports the provision of competitive service to tenants in buildings of all kinds. If the states are permitted to adopt rules that interfere with the ability of property owners to place the demarcation point at the best location to meet the needs of their tenants, the FCC’s policy goals will not be met. State regulations that increase the cost and complexity of providing competitive services to residents of multiunit buildings will hinder the development of competition.

The effect of the Florida Rule and BellSouth’s practice, as described in the Petition, is to delay entrance by competitors and increase costs to competitors, because competitors are forced to install a parallel set of wires on the premises. In some cases, the additional cost and delay may make it impractical for a competitor to serve a property. Indeed, in this case, the Petitioners assert that “[t]here is no economical way for ClickQuick II to provide its service” if it is unable to use the existing wiring. Petition at 2-3. The Property Owners wish to introduce facilities-based competition in the residential setting – one of the Commission’s principal goals – but the Florida rule is allowing BellSouth to interfere with that goal. Thus, the Florida Rule not only conflicts with the express language of the FCC Rule, but it also has an anticompetitive effect, and thus conflicts with federal policy. *NARUC*, 880 F.2d at 431. Consequently, the Florida Rule must be preempted.

II. THE PROPERTY OWNERS HAVE THE RIGHT TO SET THE DEMARCATION POINT AT THE CHOSEN LOCATION BECAUSE THE FCC RULE EXPRESSLY GIVES THEM THAT RIGHT.

The FCC Rule clearly states that “[i]f the provider of wireline telecommunications services does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points.” This is exactly what the Property Owners seek to do. BellSouth has not elected to place the demarcation point at the MPOE, and the Property Owners have accordingly notified BellSouth that they wish to establish the demarcation point at a specific point that is at or near the MPOE. The FCC Rule gives them that right. The purpose for which they seek to establish the demarcation point at that location is irrelevant. Indeed, relocating the demarcation point could ultimately allow the entrance of additional providers, in addition to or instead of BellSouth and ClickQuick. Consequently, the relief requested by the Petition both conforms to the FCC Rule and would advance competition. The Commission should enter an order affirming the rights of the Property Owners to move the demarcation point.

III. THE COMMISSION SHOULD NOT GRANT THE PETITION TO THE EXTENT THAT DOING SO WOULD VIOLATE THE FIFTH AMENDMENT, BUT AT THE SAME TIME THE COMMISSION SHOULD CONSIDER WHETHER ADDITIONAL STEPS CAN BE TAKEN TO ALLOW COMPETITIVE PROVIDERS TO USE INSIDE WIRING IN A MANNER CONSISTENT WITH THE FIFTH AMENDMENT.

The Petition appears to present a novel question for the Commission, or at least one that has not been fully addressed. The focus of the Commission’s past orders dealing with the demarcation point and inside wiring has been on the right of customers and previous owners to use inside wiring. The Commission has not expressly ruled that a competitive carrier may connect to inside wiring controlled by a premises owner in order to deliver services to subscribers over that wire. BellSouth’s position seems to be that if ClickQuick connects its

facilities to the inside wiring controlled by Petitioners, then ClickQuick will be “using” the wiring, and that BellSouth has the right to prevent that use. BellSouth appears to claim an ownership interest in the inside wiring of a sort that would allegedly render ClickQuick’s use of the wiring a “taking” of BellSouth’s property.

In principle, the RAA supports the right of building owners to permit competing providers to connect their facilities to inside wiring that is controlled by the building owner. The RAA also supports the right of building owners to designate competing providers as their contractors or agents for purposes of managing inside wiring and relocating demarcation points. These principles are important to the development of residential facilities-based competition. But at the same time, the RAA is very sensitive to the issue of property rights. In the past, the members of the RAA have refrained from supporting actions that might have favored building owners but might also have resulted in the taking of provider-owned wiring. *See, e.g.,* Further Joint Comments of Building Owners and Managers Association International, et al., *Telecommunications Services Inside Wiring*, CS Docket No. 95-184, MM Docket No 92-260 (filed Sept. 25, 1997), at 8. Consequently, although granting the Petition would advance the interests of property owners who wish to introduce competitive access to their buildings, the RAA cannot support the Petition if allowing ClickQuick to transmit its signals over the inside wiring in question would constitute a taking of BellSouth’s wiring. For that reason, the RAA cannot support the Petition, at least until certain issues are resolved.

Among other things, we note that it is not clear from the Petition that BellSouth actually holds title to the wiring. For example, is the wiring a fixture under Florida law? In addition, we note that BellSouth has been on notice of the rights established by the FCC Rule since 1991, when the original version of the rule took effect. BellSouth has known that property owners had

the right to assume control of any wiring installed on the customer's side of the MPOE.³ If BellSouth has deliberately followed a policy of installing inside wiring at its own expense, without entering into written agreements with property owners spelling out the rights of the respective parties, it has done so in the knowledge that the Commission intended to deregulate inside wiring and had expressly limited BellSouth's control over such wiring.⁴ One could therefore argue that BellSouth has waived any right to compensation,⁵ and that the Commission has implicitly addressed this issue in the FCC Rule: references to the customer's use and control of inside wiring include use of the wiring to receive services from any provider, and no special or

³ We note in passing that to the extent that ClickQuick's rights may depend on any agreement between ClickQuick and the Property Owners, we do not believe that the Commission has the authority to adjudicate the question of whether ClickQuick has the right to use facilities on the customers' side of the demarcation point. To reach such a conclusion, the FCC would need to rule on matters of Florida contract and agency law, and would be asserting jurisdiction over a property owner that is not engaged in the provision of a telecommunications service or any other aspect of the communications business. These are matters outside the scope of the authority granted to the Commission under any provision of the Communications Act. *See, e.g., Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972). For the reasons discussed above, however, it is clear that the Property Owners have the right to establish the location of the demarcation point, and the Florida Rule is preempted to the extent that it interferes with that right. It is also clear that BellSouth cannot interfere with the owners' rights. With those issues resolved, we believe that the state law questions regarding ClickQuick's authority could be readily resolved in the proper forum, should such a proceeding be necessary. In any event, we believe that all that is really required here is a ruling on the general issue of the rights of property owners and competitive providers under 47 C.F.R. § 68.105(d)(2).

⁴ The Commission has ruled that carriers are not entitled to additional compensation for the use of their wiring, because there are already procedures in place under which carriers recover their costs. *Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 11897, ¶ 32 (1997) ("*Inside Wiring Order*").

⁵ Or, because BellSouth installed the wiring knowing it would not be able to retain control over it if the Property Owners chose to assert their rights under the FCC Rule, one might argue that the wiring was abandoned.

additional consent is required by the provider. Otherwise, as this case illustrates, incumbents will be able to exercise their position in the market to block competitive entry. Accordingly, when the Commission stated that “carriers may not require that such wiring be purchased and may not impose a charge for the use of such wiring,” *Inside Wiring Order*, ¶ 32, one could argue that the Commission intended to include use of this wiring by additional facilities-based service providers.

The Commission must also consider whether the Petition presents an issue under the takings clause of the Fifth Amendment. If the Commission concludes that the relief sought by the Petition presents an unresolved “takings” question, that question therefore should be addressed. And if granting ClickQuick the relief requested would unavoidably result in a taking, the Petition should be denied with respect to that point. At the same time, however, the Petition raises an important question: if the Commission concludes that under existing law, to avoid a taking, competing providers are required to compensate incumbent carriers for use of inside wiring, under what circumstances can competing providers use inside wiring? For example, BellSouth seems to claim that because ClickQuick does not provide a telecommunications service, it has no right to use the inside wiring under any circumstances. This obviously has important ramifications for facilities-based competition. So long as incumbent providers can claim the right to prevent competitors from using inside wiring, neither building owners nor competitive providers will be able to confidently provide for the delivery of competitive services to occupants of multi-tenant buildings, except in very rare circumstances.

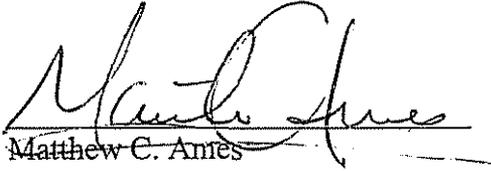
Accordingly, we refrain from urging the Commission to rule that ClickQuick has the right to use the facilities on the customer’s side of the demarcation point over BellSouth’s objections. At the same time, however, the RAA urges the Commission to carefully consider

both the facts and its earlier decisions, to determine whether (i) the Petition indeed raises a Fifth Amendment issue, and (ii) if it does, whether the Commission can take additional steps to allow competitors to connect to and use inside wiring without running afoul of the Fifth Amendment.

CONCLUSION

For the reasons indicated above, the Bureau should grant the Petition in part.

Respectfully submitted,



~~Matthew C. Ames~~
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June 4, 2003

APPENDIX A

MEMBERS OF THE REAL ACCESS ALLIANCE

- The Building Owners and Managers Association, International (“BOMA International”) is an international federation of 101 local associations. BOMA International’s 17,000 members own or manage more than 8.5 billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.
- The Institute of Real Estate Management (“IREM”) educates real estate managers, certifies the competence and professionalism of individuals and organizations engaged in real estate management, serves as an advocate on issues affecting the industry, and enhances and supports its members' professional competence so they can better identify and meet the needs of those who use their services. IREM was established in 1933 and has 10,000 members across the country.
- The International Council of Shopping Centers (“ICSC”) is the trade association of the shopping center industry. Its 38,000 members in the United States, Canada, and more than 70 other countries represent owners, developers, retailers, lenders, and all others having a professional interest in the shopping center industry. ICSC’s 34,000 United States members represent almost all of the 43,661 shopping centers in the United States.
- The National Apartment Association (“NAA”) has been serving the apartment industry for 60 years. It is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. NAA represents approximately 27,600 rental housing professionals holding responsibility for more than 4.38 million apartment households nationwide.
- The National Association of Home Builders (“NAHB”) is a federation of more than 800 state and local home builder associations nationwide, working to enhance the political climate for housing and for the building industry, and promoting policies that keep housing a national priority. NAHB’s members are engaged in all aspects of real estate development, ownership, and management, and include owners and managers of apartment buildings, condominiums, cooperatives, and community associations. NAHB is comprised of over 203,000 members, who collectively employ over eight million Americans.
- The National Association of Industrial and Office Properties (“NAIOP”) is the trade association for developers, owners, and investors in industrial, office, and related commercial real estate. NAIOP is comprised of over 9,500 members in 46 North American chapters and offers its members business and networking opportunities, education programs, research on trends and innovations, and strong legislative representation.
- The National Association of Real Estate Investment Trusts (“NAREIT”) is the national trade association for real estate investment trusts (REITs) and publicly-traded real estate companies. Its members are REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals that advise, study and service those businesses.

- The National Association of Realtors (“NAR”) is the nation’s largest professional association, representing more than 720,000 members. Founded in 1908, the NAR is composed of residential and commercial realtors who are brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. The association works to preserve the free enterprise system and the right to own, buy, and sell real property.
- The National Multi-Housing Council (“NMHC”) represents the interests of the larger and most prominent firms in the multi-family rental housing industry. NMHC’s members are engaged in all aspects of the development and operation of rental housing, including the ownership, construction, finance, and management of such properties.
- The Real Estate Roundtable (“RER”) provides Washington representation on national policy issues vital to commercial and income-producing real estate. RER addresses capital and credit, tax, environmental, technology and other investment-related issues. RER members are senior executives from more than 200 U.S. public and privately owned companies across all segments of the commercial real estate industry.

Certificate of Service

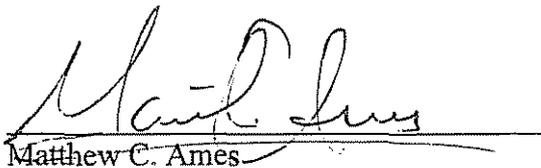
I hereby certify that I have caused to be delivered this 4th day of June, 2003, copies of the foregoing Comments of the Real Access Alliance to the following persons:

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June 4, 2003

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